89-1259
No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

ULRICH HUYSSEN,
Petitioner,

versus

FIRST UNION HOME EQUITY CORPORATION
(formerly, First Union Mortgage Corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether where it is clearly and convincingly established by the record that petitioner met and satisfied the criteria of credit-worthiness under respondent's "Lending Policy Manual"; and where respondent denied to petitioner an extension of credit in the amount of $30,900.00 for the purported reason of insufficient income, based on respondent's own esoteric calculation of petitioner's income-to-debt ratio contrary to respondent's own formula set out by respondent in respondent's own Lending Policy Manual (App. L, pp. 1L-12L) is a valid permit for the prudent inference to be drawn that respondent's denial of the extension of credit to the petitioner, ULRICH HUYSSEN, was because of his national origin (German), or his Christian religious denominational affiliation (a Gospel Minister of the Interdenominational World Missions for Jesus); and that, therefore, the respondent's denial of the extension of credit to the petitioner was unlawfully impermissible, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f (App. F, pp. 1f-16f); and that respondent's articulation for the denial is a pretext?

2. Whether where the evidence adduced on trial, if that evidence had been by the Court presented to the jury, was sufficient to reasonably presume that the natural inference to be drawn by the jury, if the Court had not withdrawn the jury, would have been in accord with that of the petitioner, i.e., but for reasons of unlawfully prohibitory discrimination based on national origin or religion, vel non, the respondent would not have rejected Petitioner's "Loan Application" (App. J, pp. 1j-11j) for an extension of credit in the amount of $30,900.00;

and, therefore, the Trial Court committed reversible error by withdrawing the jury and refusing to submit the case for jury determination?

3. Whether the Trial Court by denying petitioner's timely filed Motion for New Trial (App. O, pp. 1o-16o) committed reversible error where respondent was requested under discovery (App. N, pp. 1n-15n) to produce its relevent Loan Register; but refused to do so on grounds that no such register was kept or maintained by respondent; but, however, it was adduced on trial that the requested information was kept and maintained by the respondent in its file cabinet and not in a Loan Register; and where, therefore, petitioner discovered that respondent had, or did for other loan applicants, in its calculation of income-to-debt ratio, treated/figured within its formula verified tax depreciations as nontaxable income; but, however, in calculating petitioner's income-to-debt ratio the respondent, within its formula, treated/figured petitioner's verified tax depreciations as taxable income, differently from other loan applicants and contrary to the requirements of its Lending Policy Manual (App. L, pp. 6L-7L), and, thereby, rejected the loan application of petitioner and denied to him the extension of credit on pretext of insufficient income, in violation of ECOA, 15 U.S.C. §§ 1691-1691f (App. F, pp. 1f-16f))?

LIST OF PARTIES TO THE PROCEEDING

THE PETITIONER IS:

ULRICH HUYSSEN, who was born of German parents in Meiningen, Germany, and who came to the United States on May 22, 1964, visiting, and was issued an "Immigration Visa" on January 27, 1965, is, thereby, a permanent resident of the United States with the "Green Card."

THE RESPONDENT IS:

FIRST UNION HOME EQUITY CORPORATION (formerly, First Union Mortgage Corporation), is a business corporation with its principal place of business in Charlotte, North Carolina, engaged in the business of extending credit and authorized to do business in East Baton Rouge Parish, State of Louisiana; and is a "creditor" by definition under 15 U.S.C. § 1691a(e) (App. F, p. 5f).

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versus

FIRST UNION
HOME EQUITY CORPORATION
(formerly, First Union Mortgage Corporation),
Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioner, ULRICH HUYSSEN, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a-4a) is not reported; and the reasons for judgment (App. B, pp. 1b-2b), judgment (App. C, p. 1c), and ruling on motion for new trial (App. D, pp. 1d-2d) of the District Court are not reported.

JURISDICTIONAL STATEMENTS

The opinion of the Court of Appeals (App. A, pp. 1a-4a), of which review is sought, was entered on October 18, 1989; and was received by Petitioner's counsel of record on October 20, 1989.

On January 4, 1990, Mr. Justice White signed an order (App. E, p. 1e) extending the time for Petitioner to file a petition for a writ of certiorari in the above-entitled case to and including February 5, 1990.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment VII (App. M, p. 1m).

STATUTORY PROVISIONS INVOLVED

The case is predicated on the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f, inclusively (App. F, pp. 1f-16f), as will more fully appear by reference to the Complaint (App. G, pp. 1g-14g), and the Pretrial Stipulation (App. H, pp. 1h-25h).

Also, involved is: 28 U.S.C. § 1331 (App. I, p. 1i).

The pertinent text of the foregoing are set forth in the respective Appendix, under separate cover.

STATEMENT OF THE CASE

The petitioner, ULRICH HUYSSEN, of German national origin, was born in Meinigen, Germany, to German parents that were/are citizens of Germany; but, however, the Petitioner came to the United States in 1964 and is a resident of the United States with the "Green Card."

On February 11, 1986, the Petitioner commenced this action by filing his Complaint (App. G, pp. 1g-14g) against the Respondent in the United States District Court for the Middle District of Louisiana (Section "A"), alleging that the Respondent had rejected his Application for Credit (App. J, pp. 1j-11j), dated August 29, 1984, by which he sought an extension of credit in the amount of $30,900.00, at an annual rate of interest of 12.5%, to be secured by a second mortgage on a certain particularly described piece of real estate situated in East Baton Rouge Parish, Louisiana.

The Respondent's rejection of Petitioner's loan application for an extension of credit was pretextually for reasons of insufficient income, based on Respondent's esoterically manipulative maneuvers of Petitioner's income tax information (as appears by reference to the Affidavit of Dr. Jan Warren Duggar (App. K, pp. 1k-6k)), contrary to the pertinent provisions of Respondent's own Lending Policy Manual (App. L, pp. 1L-12L), by treating/figuring depreciations (nontaxable income) as taxable income.

The Respondent's Lending Policy Manual (App. L, pp. 6L-7L), at pp. 36-37, § 300, Topic .002, Subtopic .10, which was issued or revised 11/19/81, provides:

> (3) The lower right hand column (side) is for the calculation of FUMC's debt to income ratio.
>
> (a) Enter the borrower's "Total annual taxable income" from volume above.
>
> (b) Multiply this income by a factor to produce "net" after tax income. This factor is 70% except in Florida and Tennessee where it is 75%.
>
> (c) This computation yields "net annual taxable income."
>
> (d) Add to this figure any non-taxable income shown in the column for "non-taxable" income.
>
> (e) we now have calculated the borrower's "net annual" income.
>
> (f) This annual figure must now be reduced by dividing it by the appropriate number of months for which it is received (which is usually 12).

> (g) Now we have our "net" monthly income to which we can apply our debt to income percentage per company policy.
>
> (h) Multiply the "net" monthly income by 55% our debt to income percentage, to determine the amount we would allow in monthly obligations.

After these calculations compare your results to "total monthly obligations" in the left hand column. If your calculation yields the higher number, we have an acceptable debt to income ratio. If your calculation is lower than "total monthly obligations" our borrower(s) lack ability and should be rejected (App. L, p. 7L).

This form (App. K, p. 5k) is to accompany all submissions [Cf. App. K, p. 2k, § 5.] as well as becoming a part of your closed loan package (App. L, p. 7L).

It is established by the record, that at all times applicable to this litigation the Respondent's Baton Rouge Branch Office Manager who initially calculated Petitioner's income-to-debt ratio, in accordance with the formula set forth and painstakingly spelled out in the Respondent's Lending Policy Manual (App. L, pp. 1L-12L) was well trained in, acquainted and familiar with the use and application of the formula and the lending policy of the Respondent; and, therefore, being satisfied that Petitioner had met the criteria of credit-worthiness under the guidelines of Respondent's Lending Policy Manual, forwarded the "submission package" as being acceptable, entitling petitioner, ULRICH HUYSSEN, to an extension of credit in the amount of $30,900.00 under the guidelines of Respondent's Lending Policy Manual (App. L, pp. 6L-7L).

The "submission package" was standard; and Petitioner's monthly income calculated to be higher than his debt, or total monthly obligations, or at an income-to-debt ratio which justi-

fied him to an extension of credit in the amount of $30,900.00 by the respondent, FIRST UNION HOME EQUITY CORPORATION.

The Respondent was able to determine Petitioner's national origin (German) and Christian religious denominational affiliation (a Gospel Minister of the Interdenominational World Mission for Jesus) by reviewing his Application for Credit (App. J, pp. 3j and 5j); and, therefore, can not be allowed to contend that it lacked such knowledge at the time of its rejection of Petitioner's application for extension of credit.

The Respondent, through its then present and past Baton Rouge Office Branch Managers, was requested under Deposition Subpoenae (App. N, pp. 1n-15n) to produce its relevant Loan Register; but refused to do so on pretense that no such register was kept or maintained by the Respondent; but, however, trial evidence established that the Respondent did keep and maintain the information Petitioner sought to discover via the Deposition Subpoenae in the individual loan applicants' personal files, filed by the Respondent, in accordance with its "standard office procedures" (SOP), in its file cabinets.

It was clearly envisaged that if the Court had submitted the case for jury determination, it is a logical assumption that the jury would have drawn the inference, based on the documentary and creditable testimonial evidence adduced on the trial, that but for the respondent's unlawfully prohibitory acts of discrimination against Petitioner because of his national origin and/or religion denominational affiliation, or for other proscriptive acts within the ambit of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (App. F, pp. 1f-16f), the Respondent would not have rejected Petitioner's loan application for an extension of credit in the amount of $30,900.00, and would have calculated his income-to-debt ratio consistently with the

formula of its Lending Policy Manual (App. L, pp. 6L-7L); and that the Respondent's articulation, that the rejection was for insufficient income, was a pretext for discriminatory credit practices, or unfair credit practices, proscribed by ECOA.

REASONS FOR GRANTING THE WRIT

The material difference in the outcome of Respondent's calculation of Petitioner's income-to-debt ratio and that of the Petitioner's called expert, Dr. Jan Warren Duggar, is that Dr. Duggar, under the formula and guidelines of the Respondent's Lending Policy Manual, considered and treated depreciations as non-taxable; and that the Respondent disregarded the formula and guidelines of its own Lending Policy Manual and considered and treated depreciations as taxable income in its calculation of Petitioner's income-to-debt ratio; and, thereby, the Respondent, without just cause, and pretextually, deviated from the criteria of its own Lending Policy Manual and intentionally, arbitrarily, and capriciously rejected Petitioner's loan application for the extension of credit in the amount of $30,900.00.

A. The natural inference is that the Respondent rejected the Petitioner's loan application — for an extension of credit in the amount of $30,900.00 — because of his national origin (German) and his religious affiliation (a Gospel Minister of the Interdenominational World Mission for Jesus), or otherwise, engaged in unlawful credit discrimination against him in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f; and that the Respondent's assertion for the rejection of his loan application is a pretext; in that it is shown

that the Respondent intentionally disregarded the guidelines of its own Lending Policy Manual (App. L, pp. 6L-7L) to come up with a calculation of income-to-debt ratio apparently designed to camouflage its intentionally discriminatory acts against petitioner, ULRICH HUYSSEN, based on his national origin and religion, in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (App. F, pp. 1f-16f).

B. After Petitioner had made out a prima facie case upon factual evidence from which a natural inference could be drawn that Respondent had rejected Petititioner's loan application and had denied him extension of credit without just cause, or because of his national origin or religion, in violation of ECOA, it was prejudicial error for the Trial Court to decline jury-determination of the case.

C. Petitioner's motion for new trial focusing on misleading ambiguity employed by Respondent in its Lending Policy Manual (App. L, pp. 6L-7L) should have been granted by the Trial Court for reasons that such ambiguity should have been construed against the Respondent.

I. THE NATURAL INFERENCE IS THAT PETITIONER'S CREDIT APPLICATION WAS REJECTED IN VIOLATION OF ECOA, 15 U.S.C. §§ 1691-1691f.

The natural inference to be drawn from Respondent's manipulative maneuvers in its employment of the Income Tax information provided by Petitioner in his "submission package" required by Respondent for the purposes of its scrutinization to determine his financial sufficiency to service a second mortgage loan in the amount of $30,900.00, in accor-

dance with its standing lending policy criteria, devoid of any esoteric application of the Income Tax information in making the determination of his financial capability, is that Respondent discriminated against Petitioner because of his national origin (German), or because of his religion (a Gospel Minister of the Interdenominational World Mission for Jesus), in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f (App. F, pp. 1f-16f).

The Respondent's articulated reason that it rejected Petitioner's loan application because of "insufficient income" is a pretext to camouflage Respondent's deviation from the prescribed formula and guidelines of its own Lending Policy Manual to intentionally calculate Petitioner's income-to-debt ratio, by applying his Income Tax information in a manner to produce a negative effect and discrimination against Petitioner, because of his national origin, or religion in violation of ECOA.

> Although starting point in any case involving statutory construction must be language employed by Congress, relevant legislative history of a particular statute may be examined in order to ensure that its literal application fulfills congressional intent. *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (1983).

As was said by the Court of Appeals, via analogy, that:

> Intent can usually only be inferred from circumstantial evidence. Today, employers, and their supervisors, who might choose to discriminate on the basis of race have become, as a result of twenty years of Title VII litigation, too sophisticated to use racial epithets or to leave glaring tracks if an employee is being discharged for race-related reasons. Instead, the motive is veiled behind apparently neutral

> remarks about business necessity, an employee's inadequate performance, attitude and the like. *Barnes v. Yellow Freight Systems, Inc.*, 778 F.2d 1096, at 1101 (5th Cir. 1985).

To add potence to the question: Whether the Respondent deviated from the formula and guidelines of its Lending Policy Manual, in its calculation of Petitioner's income-to-debt by applying Income Tax information from Petitioner's loan application "submission package" in a manner to intentionally yield a negative result and establish the Respondent's articulated reason to discriminate against Petitioner in violation of ECOA? Therefore, via analogy, we now turn to the case of *United States v. American Future Systems, Inc.*, 571 F.Supp. 551 (D.C. Penn. 1983), where the court said:

> Preponderance of evidence standard is applicable in assessing whether special credit purpose programs are either established or administered with the purpose of evading the requirements of Equal Credit Opportunity Act or regulation B or whether in the absence of purposeful discrimination, equitable relief is necessary to enforce the requirements imposed by law. Truth in Lending Act §§ 704, 706, as amended, 15 U.S.C.A. §§ 1691c, 1691e.

The Respondent should not be allowed to deviate from its standing guidelines of its Lending Policy Manual and choose esoteric methods, at its discretion, of doing things that are facially discriminatory and in violation of Appellant's protected rights under ECOA. The lending provision section of Respondent's Lending Policy Manual, should be interpreted in a manner that effectuates a central purpose that would eliminate discretionary applications allowing "at will" unlawful discrimination in credit practices in violation of ECOA.

> No showing of any specific intent to discriminate or statistical showing of adverse impact on protected class is necessary to establish prima facie case of violation under 15 U.S.C. §1691e. *Miller v. American Exp. Co.*, 688 F.2d 1235 (C.A. Ariz. 1982).

ECOA being a "discrimination" statute, its most imaginative use may be in that area. Courts are free to look at the effects of a creditor's practice, as well as the creditor's motive or conduct in individual transactions. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN THAT IT REFUSED TO SUBMIT THE CASE FOR JURY DETERMINATION.

At the close of evidence of Petitioner's case-in-chief; and Petitioner rested, the Respondent orally moved the Court "to direct a verdict in favor of First Union"; but, however, the Court deferred ruling, for oral reasons dictated into the record (App. B, pp. 1b-2b).

At the close of all evidence, and both parties had rested, the Petitioner, then, orally moved the Court for a directed verdict, which was denied, for oral reasons dictated into the record (App. B, pp. 1b-2b). The Respondent, then, again, orally moved for a directed verdict, which was granted, for oral reasons dictated into the record (App. B, pp. 1b-2b). Consequently, the Court dismissed Petitioner's case with prejudice (App. C, p. 1c), without giving the jury the opportunity to decide the pertinent factual issues:

1. Whether from the evidence adduced an inference

could be drawn that Petitioner had satisfactorily met all of the criteria of credit-worthiness under the guidelines of the Lending Policy Manual of Respondent; and that Respondent deviated from its prescribed formula and standing guidelines to consider and treat Income Tax depreciations as taxable income and not as non-taxable income in its calculation of Petitioner's income-to-debt ratio to camouflage its unlawfully discriminatory practices against Petitioner, because of his religion, or national origin, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f?

2. The Petitioner's entitlement to damages under equitable relief.

In an action brought under ECOA in which the plaintiff alleged she was illegally denied credit on the basis of her husband's unfavorable credit rating. The Court held:

> A jury trial is required in an action brought under the Equal Credit Opportunity Act. *Vander Missen v. Kellogg-Citizens Nat. Bk., Etc.*, 83 F.R.D. 206 (E.D. Wis. 1979).

The Equal Credit Opportunity Act, in purposes, is not unlike the fair housing provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631, where it was said:

> Action for damages under the fair housing provisions of Civil Rights Act of 1968 was an action to enforce "legal rights" within meaning of Seventh Amendment decisions and either party on demand was entitled to jury trials. *Curtis v. Leother*, 415 U.S. 189, 94 S.Ct. 1005, L.Ed.2d 260 (1974).

The Trial Court erred in declining the jury trial by not submitting the case to the jury for determination in that it was satisfactorily shown that Petitioner had established a

prima facie case by showing he had met all objective requirements for extension of credit to the Respondent under the criteria of its Lending Policy Manual (App. L, pp. 1L-12L); and from which the inference that the Respondent had discriminated against the Petitioner in violation of the Equal Credit Opportunity Act could have been drawn; or that the jury could have returned a verdict for wrongful action and awarded damages against the Respondent.

It is submitted that an action under ECOA for damages may be an action to enforce "legal rights" within the meaning of Seventh Amendment (App. M, p. 1m) decisions. Cf. *Ross v. Bernard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970).

III. UNEXPLAINED AMBIGUITY IN RESPONDENT'S LENDING POLICY MANUAL IS ITS RESPONSIBILITY; AND IS BASIS OF PETITIONER'S NEW TRIAL MOTION.

The Petitioner, as a loan applicant, is at a loss to this date to know which allowable Federal Income Tax schedules depreciations are treated as non-taxable income in its calculation of income-to-debt ratio under Section 300, Paragraph (3)(d), page 37 of its Lending Policy Manual (App. L, p. 7L), which provides for "depreciations" to be added back into the income-to-debt calculation formula as income to the Petitioner, as a loan applicant, which effectively reflects an enhancement in available income to service the debt. The only explanation the Respondent makes is that Respondent treats all of its customers, or loan applicants, the same, which was an explanation the Respondent never made prior to trial.

At trial, the Respondent revealed that it was nationwide and its lending policy practices, except for state laws peculiarities, were the same nationwide, which aroused Petitioner's curiosity to ascertain the veracity of that revelation by making an inquiry (App. O, p. 5o) under the pseudonymity, Steve Starr, on the Respondent's Northwest Office Center in Oklahoma City, Oklahoma, who responded (App. O, p. 7o), advising that depreciations are considered available for debt service, or is added to the calculation as non-taxable income. Based on that newly discovered evidence explaining the complained of ambiguity of Respondent's Lending Policy Manual, Petitioner filed "Motion for New Trial" (App. O, pp. 1o-16o).

It appears that the following case law with regards to ambiguous language in a written instrument or document is, thusly:

> Fact of preparation of written instrument carries with it burden of responsibility for use of the words and phrases in the printed portion of the instrument. *Eastmount Const. Co. v. Transport Mfg. & Equipment Co.*, 301 F.2d 41.
>
> Natural inference is that the user of ambiguous language employed by the other party, such ambiguity should be construed against the party using the words. *Alcoa S.S. Co. v. U.S.N.Y.*, 338 U.S. 421, 94 L.Ed. 225.
>
> Natural inference is that the user of ambiguous language would make plain what is in his favor. *Gulf Refining Co. v . Home Indemnity Co. of New York*, 78 F.2d 842.

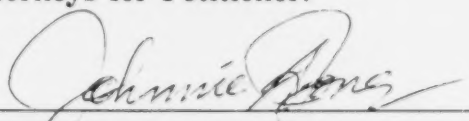
It is submitted that Paragraph (3)(d), § 300, p. 37 of the Respondent's Lending Policy Manual (App. L, p. 7L), should be restricted, limited, and be strictly construed in favor of Petitioner since he is a nonpreparatory user.

CONCLUSION

The Equal Credit Opportunity Act (ECOA) being a "discrimination" statute it should not be minimized; but should be given the **most imaginative use** in that area, especially if a creditor like the Respondent takes advantage of the "effects test" to reach the more subtle, yet more pervasive kinds of discrimination. According to the "effects test" doctrine, in determining the existence of discrimination, courts are free to look at the effects of a creditor's practice, as well as the creditor's motive or conduct in individual transactions. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

On the submissions hereof, the petitioner, ULRICH HUYSSEN, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,
Attorneys for Petitioner:



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Dated: February 1, 1990

CERTIFICATE OF SERVICE

Undersigned counsel of record for the petitioner, Ulrich Huyssen, does hereby certify that two (2) copies of the above and foregoing

PETITION FOR WRIT OF CERTIORARI,

by hand delivery or by regular United States Mail, first-class postage prepaid, are being forwarded to the opposing counsel of record, whose name and address are as follows:

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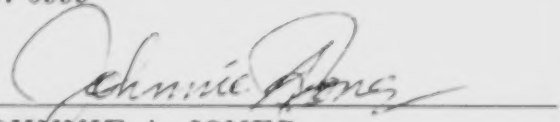

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Baton Rouge, Louisiana, this 1st day of February, 1990.